

1 KOURTNEY C. VACCARO  
2 Chief of Enforcement  
3 FAIR POLITICAL PRACTICES COMMISSION  
4 428 J Street, Suite 620  
5 Sacramento, CA 95814  
6 Telephone: (916) 322-5660  
7 Facsimile: (916) 322-1932

8 Attorneys for Complainant Roman G. Porter

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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of

) OAH No.: 2008100264

)  
) FPPC No. 05/489

HENRY HOHENSTEIN,

) **OPENING BRIEF OF THE ENFORCEMENT**  
) **DIVISION OF THE FAIR POLITICAL**  
) **PRACTICES COMMISSION REGARDING**  
) **THE PROPOSED DECISION OF**  
) **ADMINISTRATIVE LAW JUDGE**  
) **HUMBERTO FLORES**

Respondent.

The Enforcement Division respectfully submits this brief pursuant to Title 2, California Code of Regulations, section 18361.9. Section 18361.9 requires the Enforcement Division to file an opening brief within 14 days of receiving a proposed decision from an administrative law judge. On May 28, 2009, the Enforcement Division was served with the proposed decision of Administrative Law Judge Humberto Flores, which issued after a hearing in this matter on March 18, 2009, in Los Angeles, California.

**SUMMARY OF CASE**

This matter came before Administrative Law Judge Flores of the Office of Administrative Hearings, on March 18, 2009, in Los Angeles, California. Van T. Vu, former Assistant Chief Counsel, and Sandra Buckner, Investigator III, represented Complainant Roman G. Porter ("Complainant"). Respondent Henry "Hank" Hohenstein ("Respondent" or "Respondent Hohenstein") appeared

1 personally and represented himself.

2 In this matter, Respondent Hohenstein made six governmental decisions in his capacity as a  
3 City of Desert Hot Springs Councilmember regarding a proposed development project that had a  
4 boundary adjacent to real property he owned. More specifically, by voting on resolutions and an  
5 ordinance variously approving the project and granting development entitlements to the project  
6 developer – all of which were decisions in which he knew or had reason to know he had a financial  
7 interest – Respondent violated the conflict-of-interest prohibitions of the Political Reform Act (the  
8 “Act”)<sup>1</sup>.

9 Respondent Hohenstein did not dispute that he committed the following six violations of the  
10 Act:

11 COUNT 1: On December 7, 2004, as a member of the City Council for the  
12 City of Desert Hot Springs, Respondent made a governmental  
13 decision in which he had a financial interest, by voting to adopt  
14 Resolution No. 2004-66, which in turn, adopted and certified the  
15 Final Environmental Impact Report for “The StoneRidge Specific  
16 Plan,” in violation of Government Code section 87100.

17 COUNT 2: On December 7, 2004, as a member of the City Council for the  
18 City of Desert Hot Springs, Respondent made a governmental  
19 decision in which he had a financial interest, by voting to adopt  
20 Resolution No. 2004-67, which in turn, approved General Plan  
21 Amendment No. 02-04 and Zoning Map Amendment No. 02-04  
22 for “The StoneRidge Specific Plan,” in violation of Government  
23 Code section 87100.

24 COUNT 3: On December 7, 2004, as a member of the City Council for the  
25 City of Desert Hot Springs, Respondent made a governmental  
26 decision in which he had a financial interest, by voting to adopt  
27 Resolution No. 2004-68, which in turn, adopted Specific Plan No.  
28 01-04, “The StoneRidge Specific Plan” and related zoning and  
development standards, in violation of Government Code section  
87100.

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<sup>1</sup> The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

1        COUNT 4:

On December 7, 2004, as a member of the City Council for the City of Desert Hot Springs, Respondent made a governmental decision in which he had a financial interest, by voting to adopt Resolution No. 2004-69, which in turn, approved a tentative parcel map and vesting tentative tract map for "The StoneRidge Specific Plan," in violation of Government Code section 87100.

5        COUNT 5:

On December 7, 2004, as a member of the City Council for the City of Desert Hot Springs, Respondent made a governmental decision in which he had a financial interest, by voting to adopt Resolution No. 2004-70, which in turn, approved Development Agreement No. 01-04 for "The StoneRidge Specific Plan," in violation of Government Code section 87100.

9        COUNT 6:

On February 1, 2005, as a member of the City Council for the City of Desert Hot Springs, Respondent made a governmental decision in which he had a financial interest, by voting to adopt Ordinance 2005-06, which in turn, approved the Development Agreement for "The StoneRidge Specific Plan" development, in violation of Government Code section 87100.

13        Consequently, as agreed to by Complainant and Respondent Hohenstein, the scope of the  
14 administrative hearing was limited to a determination of the appropriate monetary penalty.  
15 Complainant maintained that the maximum per count penalty of \$5,000 was warranted for these serious  
16 violations of the Act. In summary, Complainant argued that Respondent's violations negatively  
17 impacted the public trust in the City of Desert Hot Springs' local government and led to a grand jury  
18 investigation. Complainant further argued that once the violations were made public, Respondent  
19 sought to mislead the public regarding why and how the violations occurred and allowed the time  
20 period to lapse to allow the City Council to rehear the matter. Complainant further alleged that  
21 Respondent was grossly negligent in ignoring the volumes of information available to him that would  
22 have put him on notice of the conflict of interest and the need for him to be disqualified. Moreover, as  
23 shown by the proffered evidence, at no time did Respondent seek the assistance of the Commission or  
24 others prior to voting on any of the StoneRidge matters.

25        Notwithstanding Complainant's request for the maximum per count penalty, which would have  
26 resulted in a maximum penalty of \$30,000, Judge Flores imposed \$3,000 per count for a total penalty of  
27 \$18,000. In imposing this penalty, Judge Flores considered and applied the following factors set forth  
28 in Regulation 18361.5:

- 1 • The seriousness of the violation.
- 2 • The presence or absence of any intention to conceal, deceive, or mislead.
- 3 • Whether the violation was deliberate, negligent, or inadvertent.
- 4 • Whether Respondent demonstrated good faith by consulting Commission staff or any
- 5 other agency in a manner not constituting a complete defense under Section 83114,
- 6 subdivision (b).
- 7 • Whether the violation was isolated or part of a pattern or whether Respondent had a prior
- 8 record of violations of the Act or similar laws.
- 9 • Whether Respondent, upon learning of the reporting violation, voluntarily filed amendments
- 10 to provide full disclosure.

11 In applying these factors, Judge Flores determined that Complainant established that this matter  
12 involved serious violations “because they directly relate to prohibitions against conflicts of interest,  
13 which is the overriding purpose of the Political Reform Act.” (Proposed Order, p.10, ¶ 10.B.) Judge  
14 Flores further found, and the evidence established, that Respondent discovered the conflict of interest  
15 shortly after casting his February 1, 2005, vote for Ordinance No. 2005-06. While Respondent  
16 contacted the City Manager and City Attorney shortly thereafter, he neither informed the City Council  
17 of the matter in time for it to void the vote and hear the matter, nor publicly acknowledged the conflict  
18 until August 2, 2005. (Proposed Order, p.11, ¶ 10.C.) Regarding Respondent’s blatant negligence in  
19 this matter, Judge Flores also stated:

20 The evidence established that respondent was negligent in discharging his duties as a  
21 City Council member because he ignored substantial information that was provided to  
22 him on an ongoing basis that clearly indicated that his real property interest was adjacent  
23 to the StoneRidge project, and was directly related to his governmental decisions on the  
24 project. Respondent’s negligence is particularly serious in this case because of his  
25 extensive experience and education in city and regional planning, and his position as the  
26 City Council’s liaison to the Planning Commission.

27 (Proposed Order, p.11, ¶ 10.D, emphasis added.)

28 Despite acknowledging Respondent Hohenstein’s apparent negligence and the seriousness of

1 the violation, Judge Flores nonetheless gave great weight to his determination that “[a]lthough  
2 respondent’s votes on the resolutions are considered five separate violations of the act (sic), they  
3 occurred on the same day. Respondent’s voted on the Ordinance two months later. Therefore,  
4 respondent’s actions, though serious, do not represent a pattern of misconduct. Finally, he has no prior  
5 record of violating the Political Reform Act.” (Proposed Order, ¶ 10.F.)

## 6 **ENFORCEMENT DIVISION POSITION**

### 7 **A. The Law.**

8 Regulation 18361.9 requires the Enforcement Division to submit this opening brief but does not  
9 mandate its contents. Rather, Regulation 18361.9 invites the Enforcement Division to address matters  
10 that *may* include the following:

- 11 • Whether the facts stated in the proposed decision are consistent with the evidence  
12 presented.
- 13 • Whether the proposed decision contains an accurate statement and/or application of the  
14 law.
- 15 • Whether there is additional material evidence that could not, with reasonable diligence,  
16 have been discovered and presented at the administrative hearing.
- 17 • Which of the dispositions provided for in Government Code section 11517 is  
18 recommended by the Enforcement Division and why.
- 19 • Any other issue the Enforcement Division determines to be relevant.

20 (Regulation 18361.9, subd. (b).)

21 Government Code section 11517, a provision of the Administrative Procedure Act, provides  
22 that within 100 days of the Commission’s receipt of Judge Flores’s proposed decision, the Commission  
23 may do any of the following:

- 24 • Adopt the proposed decision in its entirety.
- 25 • Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed  
26 decision.
- 27 • Make technical or other minor changes in the proposed decision and adopt it as the  
28 decision. However, action by the Commission in this regard is limited to “a clarifying

1 change or a change of a similar nature that does not affect the factual or legal basis of the  
2 proposed decision.”

- 3 • Reject the proposed decision and refer the case to Judge Flores, if he is reasonably  
4 available, otherwise to another administrative law judge, to take additional evidence.
- 5 • Reject the proposed decision, and decide the case upon the record, including the transcript,  
6 or upon an agreed statement of the parties, with or without taking additional evidence.

7 (Section 11517, subd. (c)(2).)

8 **B. Accept the Proposed Decision.**

9 The Proposed Decision accurately summarizes the facts and is consistent with the proffered  
10 evidence. There is no additional information or evidence that the Enforcement Division should have  
11 presented in this matter.

12 Guided by the options set forth in Government Code section 11517, the Enforcement Division  
13 recommends that the Commission accept the Proposed Decision even though it arguably imposes a  
14 penalty that fails to reflect the seriousness of Respondent’s conduct and the violations. As supported  
15 by the evidence and the findings of the Proposed Decision, Respondent Hohenstein had ample reason  
16 and opportunity to make reasonable inquiry regarding the true boundaries and potential impact of the  
17 StoneRidge project on his real property interests. He did not avail himself of this opportunity. Indeed,  
18 the record in this matter shows that Respondent “ignored substantial information that was provided to  
19 him, on an ongoing basis, that clearly indicated that his real property interest was adjacent to the  
20 StoneRidge project, and was directly related to his governmental decisions on the project” despite his  
21 extensive experience and education in city and regional planning, and his position as the City Council’s  
22 liaison to the Planning Commission. (Proposed Order, p.11, ¶ 10.D.).

23 Even so, as Judge Flores noted, Respondent Hohenstein’s actions, though serious, do not  
24 represent a pattern of misconduct and he has no prior record of violating the Act. Furthermore, the  
25 Enforcement Division recognizes that its zealous enforcement of the Act and perspective on the penalty  
26 amount is not the only reasonable perspective. After conducting a full hearing on the merits and  
27 considering the required factors for imposing a monetary penalty, Judge Flores made what appears to  
28 be an unbiased and thoughtful determination regarding the penalty amount. For this reason the

1 Enforcement Division respectfully defers to Judge Flores's determination.

2 Respectfully submitted,

3  
4 Dated: 6/11/19



Kourtney C. Vaccaro  
Chief of Enforcement

## **PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814. On the date below, I served the following document(s):

**The original plus six copies of the document entitled:**

**OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR  
POLITICAL PRACTICES COMMISSION REGARDING THE  
PROPOSED ORDER OF ADMINISTRATIVE LAW JUDGE HUMBERTO  
FLORES**



**By personal service.**



I personally delivered the document(s) listed above to the person(s) at the address(es) as shown on the service list below.



By providing the document(s) listed above with instructions for registered process server to personally deliver the envelope(s) to the person(s) at the address(es) set forth on the service list below. **The signed proof of service by the registered process server is attached.**

### **SERVICE LIST**

Roman G. Porter  
Executive Director  
Fair Political Practices Commission  
428 J. Street, Suite 620  
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 11, 2009.

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Galena West



## **PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814. On the date below, I served the following document(s):

### **OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION REGARDING THE PROPOSED ORDER OF ADMINISTRATIVE LAW JUDGE HUMBERTO FLORES**

- ☒ By United States Postal Service. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the addresses listed below and:
- ☒ Placed the envelope or package for collection and mailing by first class mail, following my company's ordinary business practices. I am readily familiar with this business' practice for collection and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☒ Placed the envelope or package for collection and mailing by certified mail, return receipt requested, following my company's ordinary business practices. I am readily familiar with this business' practice for collection and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail in Sacramento County, California.

### **SERVICE LIST**

Henry Hohenstein  
65-154 Cliff Circle  
Desert Hot Springs, CA 92240

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 11, 2009.

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Carmen Bupara